Esco Elevators, Inc. *and* International Union of Elevator Constructors, Local 21, affiliated with International Union of Elevator Constructors. Case 16–CA–10486

28 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 29 December 1982 Administrative Law Judge Richard J. Linton issued the attached decision. The Charging Party filed exceptions and a supporting brief, in support thereof, and the Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge's finding that the evidence presented in support of the complaint is insufficient to establish a prima facie case that the Respondent discriminated against Roy Boring by denying him a wage increase in April 1982 and by discharging him in May 1982.

As found by the judge, the General Counsel's and the Charging Party's reliance on a discriminatory motive based on Boring's testimony adverse to the Respondent in another unfair labor practice proceeding in September 1981 is seriously undercut by the fact that after that hearing Boring received in October 1981 what was the highest merit wage increase in his employment history with the Respondent. In this setting and as explained further we agree with the judge's conclusion that there is an insufficient basis to infer an unlawful motive.

Our dissenting colleague criticizes what he characterizes as the judge's giving "equal weight to inferences drawn from clearly unequal factual premises," and concludes that the General Counsel and the Charging Party established a prima facie case that Boring was discharged unlawfully. However, it is our colleague who incorrectly measures the weight of the inferences drawn from evidence presented on the General Counsel's direct case. By focusing on the timing of the events here, Member Zimmerman ignores or gives only superficial consideration to evidence which supports the judge's conclusion. Boring's testimony establishes that no one ever mentioned the adverse Board decision or his testimony in that case to him. More importantly, his testimony reveals that he told independent management consultant Charles Stultz in early April 1982 that his goal was to become production manager, complained to him that others in management were incompetent, and told him that he had applied for a job elsewhere. Boring admitted that he believed that Stultz reported their conversation to President Loughridge because 2 weeks later Loughridge told him he had no future with the Company and would never become production manager. Boring's comments to Stultz, so clearly reflected in Loughridge's rebuke to Boring, are not merely coincidentally related. Significantly, Boring's testimony on cross-examination also reveals that he had a history of criticizing management personnel. The fact is that Boring was warned when his pay raise was denied that his continued employment was being questioned—for reasons which have nothing to do with his testimony 8 months earlier. Thus, it is clear that our colleague's analysis is based on suspicion and timing, and it is equally clear when the inferences are properly weighed that the judge correctly concluded that the General Counsel and the Charging Party failed to establish a prima facie case that Boring's discharge violated Section 8(a)(4) of the Act.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I would find that the General Counsel established a prima facie case that the Respondent violated Section 8(a)(4) and (1) of the Act by denying a merit wage increase to Roy Boring and by subsequently terminating his employment. Accordingly, I would remand the case to the judge for the purpose of receiving evidence in the Respondent's defense and issuing a supplemental decision.

The General Counsel presented evidence through alleged discriminatee Roy Boring that in September 1981, while employed by the Respondent, he had testified against the Respondent in an unfair labor practice trial; that a decision adverse to the Respondent in that case issued on 12 February 1982 relying heavily on Boring's testimony; that in April 1982 the Respondent denied a wage increase to Boring for the first time during his employment; and that the Respondent's production manager, Bill Baty, discharged Boring on 28 May 1982 while at the same time assuring him that his work performance was good and that he would receive a favorable recommendation for another job. The judge found, and I agree, that the foregoing

evidence supports the inference "that Respondent fired Boring because his testimony played a significant part in Judge Nation's finding against the company in the McKinney case because of the timing and the fact, as Boring quotes Baty, that Boring had done a good job."

However, the judge then—and in my view improperly—drew a series of competing inferences, all based on a parcel of testimony adduced by the Respondent on cross-examination of Boring. Boring testified that 4 to 6 weeks before he was terminated he was interviewed by management consultant Daniel Stultz. It is undisputed that, before Boring proceeded with the interview, he ascertained from Stultz that his comments would be kept confidential. Boring then responded to Stultz' questions about his job, the Company, and his colleagues. In response to a question by Stultz as to Boring's ambitions and goals with the Respondent, Boring replied that one day he hoped to become the production manager. Additionally, Boring admitted that during the interview he disparaged several members of management and indicated that he had applied for a job elsewhere.

Boring also testified that, when he learned that his pay raise had been denied, he asked the Respondent's president, Bob Loughridge, why the Respondent had withheld the raise. Loughridge first responded, "You have no future with the company." Boring asked for an explanation of this comment and Loughridge said, "You're not going to become the production manager." Based on this testimony, the judge stated:

> A study of the record discloses that the timing argument overlooks a critical point—*the Stultz factor*. Boring testified that he was interviewed by Stultz in March or April, or about 4 to 6 weeks before he was terminated. More to the point, Boring testified that (in his opinion) Loughridge, in stating that Boring was not going to become the production manager, was referring to the goal Boring has expressed to Stultz. Without considering any of Respondent's evidence, the inference is rather strong that Stultz reported the details of his interview with Boring to Loughridge notwithstanding any assurance of confidentiality Stultz gave to Boring. That being the case, we therefore see that Loughridge had received a report by about mid-April 1982 that Boring not only had described at least one vice president as incompetent, but that he also had filed an employment application with another company. (Footnote and transcript references omitted.)

The judge concluded this inferential sequence by stating:

> . . . Loughridge became incensed that Boring, bearing the rather exalted title of assistant to the production manager, would express the opinion that Vice President Cal Smith was incompetent, and that as . . . Boring had filed an employment application elsewhere, demonstrating that he was seeking to leave Respondent's employ anyway, Loughridge decided that he would help persuade Boring to leave quickly by denying him a pay increase. When Boring did not leave promptly, Esco fired him. It is clear that Loughridge thought the pay increase denial would spur Boring to depart, and Loughridge said just that to Boring on the occasion of their May 28 conversation.

On the basis of these speculations, the judge found that the inferences supporting and refuting the illegality of Respondent's actions were equal, that the General Counsel had failed to establish a prima facie case, and that the complaint should be dismissed.

The error here is that the judge has given equal weight to inferences drawn from clearly unequal factual premises. First, there is no evidence to substantiate Boring's mere opinion about what Loughridge meant when referring to Boring's potential for becoming the production manager. Since Loughridge did not testify, his state of mind during this conversation is unknown. Secondly, with no supporting evidentiary basis, the judge then went beyond Boring's opinion to infer further that Stultz had disclosed to Loughridge the entire content of his interview with Boring. The judge ignored the undisputed fact that Stultz had given Boring an assurance of confidentiality prior to their conversation. Boring's unsubstantiated opinion suggested only the disclosure of his desire to become production manager, and there is no other evidence in the record that Stultz in any way breached his promise of confidentiality. Finally, the judge made a quantum jump over the facts and divined that Loughridge became so "incensed" about Boring's conversation with Stultz that Loughridge legitimately decided to oust Boring from the Company. Even assuming that Loughridge heard a full report from Stultz, how did the judge know that Loughridge became "incensed"?

For the reasons stated above I do not agree that any inference can be drawn solely from the fact of the Stultz interview and Boring's opinion as to Loughridge's comment. Certainly the speculation does not rise to the level of an inference equal to that initially found by the judge—that Boring was

fired because of his testimony in the prior Board proceeding. Accordingly, I find that the General Counsel established a prima facie case that the Respondent violated Section 8(a)(4) and (1) of the Act and that in the absence of any valid, competing inference or evidence the case should be remanded to the judge for further hearing.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case was tried before me in Fort Worth, Texas, on August 30 and 31, 1982, pursuant to the July 8, 1982 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed June 3, 1982, and subsequently amended, by International Union of Elevator Constructors, Local 21, affiliated with International Union of Elevator Constructors (Union or Local 21) against Esco Elevators, Inc. (Respondent or Esco).[1]

In his complaint the General Counsel alleges that Respondent violated Section 8(a)(4) and (1) of the Act by withholding a scheduled wage increase from Roy Boring in April and by discharging him on May 28 because he testified on September 8, 1981, in an unfair labor practice trial in Case 16-CA-9551 involving Esco.

By its answer Respondent admits certain factual matters, but it denies violating the Act.

Based on the entire record, and my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

A Texas corporation with its principal place of business in Fort Worth, Texas, Respondent manufactures, sells, and installs hydraulic passenger and freight elevators and thereafter services and repairs such elevators. During its past fiscal year, and from its Texas facilities, Respondent sold products valued in excess of $50,000 directly to customers located outside the State of Texas. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Local 21 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Respondent's organization—Roy Boring—Contentions

Esco is divided into three functions: manufacturing, sales, and maintenance-service. Robert E. Dugger, business manager of Local 21, testified that since about 1940 Esco has been signatory to successive collective-bargaining agreements covering Respondent's maintenance and service division (service) employees (Tr. 240).[2] So far as the record reflects, Respondent's manufacturing and sales divisions have never been unionized.

Esco's service division, under Vice President Glenn Young, has its principal location at Euless, a town located about midway between Dallas and Fort Worth, Texas. It also has sales and service offices in Houston and San Antonio, Texas, and in Oklahoma City, Oklahoma.

Before the summer of 1981 the entrances for Respondent's elevators were manufactured in Midlothian, a town southeast of Fort Worth, and the balance of its elevator was manufactured at an old facility in Fort Worth.[3] Around July 1, 1981, Respondent consolidated its manufacturing division at a new 200,000 square feet production facility on the south side of Fort Worth under Vice President and Manager of Manufacturing Bill J. Baty. Although Baty had been in overall charge of manufacturing for a number of years, this appeared to be the first time, at least in many years, that the manufacturing operation had been consolidated under one roof.[4]

Baty testified that he reports directly to Esco's president, R. F. "Bob" Loughridge, and that he consults with Loughridge weekly (Tr. 160, 161). Although the number of manufacturing employees is not specified, it appears that Foreman Nethery supervises about 15 employees at Fort Worth (Tr. 204). Alleged discriminatee Boring testified that he dealt with some eight or nine foremen at the Fort Worth plant (Tr. 36-37, 254). This apparently included all the manufacturing supervisors. It therefore would appear that Baty had 100 or more rank-and-file production employees.

As can be imagined, the manufacture of elevators proceeds from a lot of engineering specifications and other paperwork. One production function involves the coordination of the specification and other paperwork among the supervisors. To handle this paperwork and coordinating function, Production Manager Baty[5] hired Roy Boring around June 1 to fill a recent vacancy in the position of assistant to the production manager (Tr. 106).[6]

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[1] All dates are for 1982 unless otherwise indicated.

[2] Although Dugger testified that this relationship began shortly after Esco was formed, Respondent's sales brochure discloses that Esco has been in business since 1932 (R. Exh. 2, at 1).

[3] Tom Montgomery was the manager of the Midlothian Entrances Division and Foreman Charles Nethery was the only supervisor there. Montgomery chose not to follow consolidation to Fort Worth, but Nethery did and joined the new Fort Worth manufacturing operation as a supervisory foreman.

[4] There appears to be some distinction between manufacturing and construction, for Baty testified that Esco maintains a "construction operation" at Respondent's old production plant in Fort Worth (Tr. 105).

[5] While Respondent admitted the complaint's description of vice president and manager of manufacturing, Baty agreed that he also is called the production manager. (Tr. 104.)

[6] In his testimony (Tr. 14), and in his June 8, 1982, pretrial affidavit (R. Exh. 1, at 1), Boring describes the title as assistant production manager. Notwithstanding Boring's view of his title, his own description, and that by Baty, of his job duties and responsibilities disclose that his function

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Boring had been employed as parts manager in Esco's service division at Euless. This position was not part of the bargaining unit, and Boring has never been a member of Local 21. Boring apparently expressed interest in the vacancy under Baty, and was interviewed by Baty. Initially Boring indicated he would not accept the job because of the pay and apparently because he would have to relinquish possession of a company vehicle. He soon changed his mind, however, telling Baty that he hoped to make up the financial difference later (Tr. 109). Boring's salary record reflects that his June 8, 1981, transfer-promotion incresed his weekly pay from $296.40, to $306.40, reflecting a pay increase of 3.37 percent.

Boring's first assignment was to spend about a month at the Midlothian facility learning what he could about the manufacture of entrances there. He returned to Fort Worth about July 4. While at Midlothian he formed a rather low opinion of Nethery's supervisory ability. Moreover, he concluded that Nethery, who once asked him to supervise the men while Nethery took a nap, did not earn the salary he was receiving (Tr. 271). He further testified that Midlothian Manager Montgomery and he agreed that Nethery was not doing his job (Tr. 34). Boring testified that he observed Nethery sleeping at his desk after his lunch period at Midlothian (Tr. 258). At some point on his return to Fort Worth, Boring told Baty that in his opinion Nethery needed more control over his employees (Tr. 34). Boring concedes that at different times at Fort Worth he expressed his low opinion of Nethery's supervisory qualities to employees such as Gerald Batty, and that some of the foremen shared his views (Tr. 272). The relationship between Boring and Nethery is a significant element in Respondent's defense.

Boring worked 3 years for Esco—from May 1979 to his discharge on May 28, 1982. His first 2 years were in the service division. Respondent reviews the pay of employees every 6 months for merit pay increases. During his tenure, Boring received five merit pay increases (one being his promotion raise) and one general cost-of-living increase, following his employment on May 20, 1979, at $250 a week. Boring testified that he had never failed to receive a merit increase every 6 months during his employment (Tr. 16). This is borne out by his history card. Based on the raises shown on his employee history card (R. Exh. 3), Boring received pay increases in his weekly salary as follows:

Date	*Amount*	*% Increase*[7]
5-20-79	Hired	
-27-79[8]	12.50	5.00
-28-80	10.00	3.81
9-25-80	12.50	4.59
3-4-81 C-O-L	11.40	4.00
6-8-81	10.00	3.37
10-9-81	19.60	6.40
5-28-82	Terminated	

Boring testified that he was due a merit increase in April 1982. This would have been 6 months after his last pay increase. Baty confirms that in April Boring's name appeared on the list of those employees scheduled to received their 6 months' pay review (Tr. 121). Boring was denied on increase, and on May 28 he was fired.

As earlier noted, the General Counsel alleges that Respondent denied Boring the April increase, and fired him in May, because in September 1981 he testified unfavorably to Esco in Case 16-CA-9551. In their arguments the General Counsel and the Charging Party refine their positions so as to argue that the event which triggered Boring's downfall was the administrative law judge's February 12, 1982 decision in Case 16-CA-9551. They contend that Boring's testimony played a major role in the judge's unfavorable findings against Respondent in that case.

Respondent denies that Boring's failure to receive a pay raise in April or his discharge in May was in any way based on his NLRB testimony, and argues that Boring brought such unfavorable personnel actions on himself by engaging in "plant politics" which, while undertaken to advance his career at the expense of Foreman Nethery's, backfired and resulted in his own discharge.

2. Boring's testimony in Case 16-CA-9551

Case 16-CA-9551 involves Respondent's December 5, 1980 discharge of Charles McKinney, then Local 21's president. The Union filed an NLRB charge over McKinney's discharge, the General Counsel issued a complaint against Esco on January 16, 1981, and the matter came on for trial before Administrative Law Judge Wallace Nations on September 8 and 9, 1981. Judge Nations issued his decision on February 12, 1982, finding that, as alleged, Respondent had violated Section 8(a)(1) and (3) of the Act by discharging McKinney. Judge Nations' decision currently is on appeal before the Board based on exceptions taken by Respondent.

As Judge Nations wrote in his decision, Respondent based part of its defense on its assertion that McKinney struck the first blow in a fist fight which occurred between him and Marshall Crouch, another service employee, at the Euless facility on November 26, 1980.

Boring testified before me that prior to the earlier trial the secretary of Local 21's attorney contacted him, ascertained that Boring had been a witness to the McKinney fight, and persuaded him to visit the Union's attorney (Tr. 23). On January 26, 1981, Boring met with At-

was that of a production clerk. No party contends that Boring held any supervisory or managerial status in the job in question. Of course, as counsel for the General Counsel observes, even if Boring had possesed such authority, that factor would not be a defense to the allegation here that Respondent's actions toward Boring violated Sec. 8(a)(4) of the Act.

[7] The percentage computations are my own based on the figures shown. Not counting his 10/81 raise, Boring's average merit raise was 4.19 percent.

[8] The months for the first and second pay raises were obliterated on the exhibit. Presumably they represent approximately 10/79 and 4/80.

torney Wheat in the lawyer's office. When Boring expressed concern over his job security if he testified, Attorney Wheat informed him that he would be under subpoena, that he had nothing to be concerned about if he told the truth (Tr. 26), and that surely Esco "would not be dumb enough" to retaliate against him for testifying (Tr. 32). Boring gave his statement at Wheat's office.[9] At the instant hearing Boring explained that he testified under subpoena before Judge Nations (Tr. 26).

Called by Local 21 as a witness before Judge Nations, Boring gave testimony showing disparity of treatment and, among other matters, that Respondent expressed no real interest in who had thrown the first punch until after the complaint had issued in the case. A copy of his testimony, covering 36 pages of that transcript, is in evidence as General Counsel's Exhibit 3. Judge Nations mentions Boring by name five times,[10] and it is clear that Boring's testimony was a key factor in the findings made against Respondent by Judge Nations.

As Judge Nations noted, Boring testified that the district manager of the field service said, "Oh hell, when are these boys going to grow up," as showing Respondent's initial unconcern about the fight. In addition to such quoting of a management official in his testimony, Boring also expresed his personal *opinion* that Esco was more lenient on Marshall Crouch regarding adherence to company work and attendance rules after the fight, and, indeed, that Esco was *unfair* in this regard (G.C. Exh. 3, at 138) and in other respects as well. And not only did Boring quote management officials regarding the fight, he also quoted District Manager Payne and Supervisor Hueber concerning a conversation in Payne's office, attended by Boring, in which Payne expressed a lackadaisical attitude about matters McKinney had been contending were unsafe conditions (G.C. Exh. 3, at 143–144), and that he personally did not care for Payne, his district manager, although he respected his position (G.C. Exh. 3, at 153).

In short, there is abundant reason in Boring's 36 pages of testimony to have caused President Loughridge, if he were so minded, to retaliate against Boring.

B. *Events Following Boring's Testimony*

1. Denial of April pay increase

Notwithstanding the rather devastating nature of Boring's testimony, in October 1981, Respondent gave him the largest pay increase he had ever received with Esco.[11] Computations reflect that his 6.40-percent increase was 34.53 percent greater than his average merit increase of 4.19 percent, and 21.88 percent greater than his previous high merit increase of 5 percent. Boring admits that no official of Esco ever said anything to him about testifying at the McKinney trial (Tr. 52). Nevertheless, Boring testified that his raise did not allay his fears, for after he testified in September others told him that President Loughridge was the type of person one should never cross (Tr. 33). And he crossed Loughridge, Boring stated, by testifying at the McKinney trial.

About April 16 or 23, Boring testified, he went to see Production Manager Baty about not having received a pay increase (Tr. 16). Boring asked Baty if there was any reason he had not received a pay raise. Baty replied that there was none, and that in fact he had recommended that Boring receive a pay increase.[12] He asked if Baty had any complaints or criticism about Boring's work, and Baty replied, "No, none whatsoever." When asked if he had any suggestions on how Boring could improve his work, Baty answered, "No, not at this time." Boring then asked if his failure to get a pay raise had anything to do with his testifying at the McKinney trial. Baty responded (Tr. 17–18, 252, 273): I don't know; you'll have to ask Mr. Loughridge on that.

About 30 minutes later, in Loughridge's office, Boring asked the president if there was any reason he had not received a pay raise. "You have no future with the company," Loughridge replied. When Boring asked what he meant, Loughridge answered, "You're not going to become the production manager." To Boring's inquiry of whether he was doing his current job well enough to merit a raise, Loughridge stated, "The only raises you're going to get are the cost-of-living raises." Before Boring could ask if there was any cause-effect relationship to his former testimony, Loughridge started walking toward the door saying that he had to see a Mr. Gorman, and remarking to Boring that he and the latter would talk about the subject later (Tr. 20, 273–274). Loughridge did not testify.

On cross-examination Boring testified that (in his opinion) Loughridge's statement that Boring was not going to become the production manager was a direct reference to the aspiration Boring had expressed earlier that month to Daniel Stultz, a management consultant hired by Esco, when the latter asked Boring what his goals and ambitions were. Boring told Stultz that his goal was to become production manager of Esco (Tr. 53). During Respondent's case-in-chief, Stultz testified that Loughridge hired him to do a managerial study to determine the correct corporate structure and systems for Esco's future. In the process of interviewing management and other employees, Stultz testified, he interviewed Boring about April 14 (Tr. 77, 94–95). As with all such interviews, he gave a general, or summary, report to both Baty and Loughridge that Boring was an unhappy employee who might cause trouble and that they should keep an eye on him (Tr. 84, 85, 93).

Boring testified that Stultz never informed him as to why Esco had the consultant in the plant, and he did not recall Stultz explaining why he was interviewing Boring

[9] This record does not reflect whether the statement was taken by someone in Attorney Wheat's office or whether a Board agent met Boring there and secured a statutory affidavit.

[10] In the slip opinion, these references appear at p. 4, L. 47, and p. 5, L. 1, 2, 45, and 46. On l. 43 on p. 5 Boring is described as "a current management employee with Esco." As of September 1981, Boring had been Baty's assistant for about 3 months.

[11] Production Manager Baty testified that he was responsible for securing the raise for Boring and did so because he felt that Boring was doing a good job (Tr. 112).

[12] During Respondent's case-in chief, Baty admitted that he *lied* to Boring and passed the buck to Loughridge in order to gain time, and that in truth and in fact Baty had told Loughridge that he was not giving Boring a raise, and the reasons therefor, and Loughridge had approved the decision (Tr. 121, 137, 171, 178–179).

(Tr. 64). The interview lasted about 30 minutes, Boring testified, during which he responded to Stultz' questions about his position and how he felt about Esco and the people (Tr. 47–48, 65). However, he first ascertained from Stultz that his comments would be kept confidential by Stultz (Tr. 49).

Boring admits that when Stultz asked his opinion of certain management officials he expressed it, and this included his evaluation that some of the officials were incompetent (Tr. 49). The only such official Boring named in his testimony is Cal Smith, vice president of sales.[13] He told Stultz that he did not care for Smith. When Stultz asked why, Boring explained that it was because he did a poor job of explaining technical details about equipment, such as pumps, when showing customers through the plant (Tr. 50–51, 260). When Stultz asked if he got along with the foremen, Boring replied that he did so with all but one or two. As Boring recalled, no names of the foremen were mentioned (Tr. 51). During the interview Boring admitted to Stultz that he had made application for employment elsewhere (Tr. 52).

2. Boring fired

Boring was fired on Friday, May 28, 1982. On that day Baty called him into the manager's office, gave him an envelope, told him that he had obtained 3 weeks' vacation pay for him, and that Boring was no longer employed with Esco (Tr. 21). Boring said he had earned the vacation pay, and he asked whether he had done his job. Baty answered, "You've done a good job." Why was he being fired then, Boring asked. Baty replied:

> We're not going to get into the nitty gritty; that's all I'm going to say. It was a company decision.

Boring asked about a recommendation, and Baty responded that he would give him a good one.

Shortly thereafter Boring went to see Loughridge. With just the two of them present in the president's office, Boring asked if there was any particular reason for his termination. Loughridge told him:

> I told you before, you have no future with this company. I thought you'd quit.

To Boring's inquiry whether he had done his job, Loughridge said (Tr. 22):

> That's not the point, Mr. Boring. You don't have any future with this company.

Boring left at that point. During the rebuttal stage Boring conceded that he did not ask Loughridge whether his prior testimony was the cause for his discharge (Tr. 275). Boring testified that during his employment he had received no warnings or reprimands, either oral or written (Tr. 22).

[13] Boring testified that he did not recall Stultz asking how he felt about Glenn Young, vice president of the service division (Tr. 48).

C. *The Question of a Prima Facie Case*

Boring was the only witness called by the General Counsel during his case-in-chief, and Local 21 called no witnesses. When the General Counsel and Local 21 rested their cases-in-chief (Tr. 67), Esco moved that the complaint be dismissed. In essence Esco argued that the evidence showed nothing more than Boring's testimony in September 1981, followed in February 1982 by Judge Nations' decision, but that Boring had expressly admitted that no agent of Respondent had made any comment to him about testifying in the McKinney case. Thus, it was argued, the General Counsel and Charging Party were proceeding on nothing more than suspicion. Offsetting that suspicion, Respondent submitted, was the fact that the month after he testified at the earlier trial Boring received the biggest raise of his Esco career (Tr. 69).[14] Respondent further argued that other factors admitted by Boring, pertaining to Foreman Nethery, demonstrate that Boring had involved himself in matters that were none of his business.

The General Counsel and Local 21 hinge the timing of events on the fact that it was shortly after Judge Nations' decision issued that Boring's problems began, starting with the April denial of a pay raise and culminating the following month in his discharge.

At trial I denied Esco's motion on the basis of the timing factor because I had not studied the prior testimony and Judge Nations' decision, and because there was no record evidence that any of the reasons advanced in Respondent's argument, such as the Nethery factor, was a basis for the discharge. I pointed out that Boring had asked for the reason of his discharge and was not given one (Tr. 70–71). I cautioned, however (Tr. 71–72):

> After all the evidence is in, it may appear that your motion [is well founded] or at least that the complaint should be dismissed, but at this stage, it appears that a bare[15] *prima facie* case has been made.

A study of the record discloses that the timing argument overlooks a critical point—*the Stultz fact on*. Boring testified that he was interviewed by Stultz in March or April (Tr. 47), or about 4 to 6 weeks before he was terminated (Tr. 64). More to the point, Boring testified that (in his opinion) Loughridge, in stating that Boring was not going to become the production manager, was referring to the goal Boring had expressed to Stultz (Tr. 53). Without considering any of Respondent's evidence, the inference is rather strong that Stultz reported the details of his interview with Boring to Loughridge notwithstanding any assurance of confidentiality Stultz gave to Boring.[16] That being the case, we therefore see that

[14] At p. 17 of her brief, counsel for Local 21 suggests that Boring was given a big pay raise in October 1981 as "a clever ploy to support later retaliatory actions in the event that they [Esco] somehow lost the McKinney case."

[15] Although the transcript records "fair" at L. 1 of p. 72, the word spoken was "bare." In one other respect I correct the record. At p. 264, L. 22, the phrase should be "adverse witness" rather than "expert witness."

[16] In their briefs the General Counsel and Local 21 contend that Stultz was nothing more than a spy sent to obtain some incriminating evidence

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Loughridge had received a report by about mid-April 1982 that Boring not only had described at least one vice president as incompetent, but that he also had filed an employment application with another company (Tr. 52).

In considering the report Stultz evidently made to Loughridge, coupled with Boring's admission that no representative of Esco ever said anything to him about his testifying in the McKinney case, plus the big October 1981 raise, I conclude that the evidence adduced through the cases-in-chief of the General Counsel and Local 21 does no more that raise two possible inferences as to the real reason for Boring's discharge. *First*, one can infer that Respondent fired Boring because his testimony played a significant part in Judge Nations' finding against the company in the McKinney case because of the timing and the fact, as Boring quotes Baty, that Boring had done a good job.

A *second* and equally strong inference which can be drawn is that Loughridge became incensed that Boring, bearing the rather exalted title of assistant to the production manager, would express the opinion that Vice President Cal Smith was incompetent, and that as Boring had filed an employment application elsewhere, demonstrating that he was seeking to leave Respondent's employment anyway, Loughridge decided that he would help persuade Boring to leave quickly by denying him a pay increase. When Boring did not leave promptly, Esco fired him. It is clear that Loughridge thought the pay increase denial would spur Boring to depart, and Loughridge said just that to Boring on the occasion of their May 28 conversation.

As above noted, I find that the reasonable inferences to be drawn from the evidence are equal. That being so, the General Counsel has failed to establish a prima facie case and the complaint, in the absence of a prima facie case, must be dismissed.

In their briefs the General Counsel and Local 21 argue that the prima facie case is shown by a review of all the evidence in the record, including that adduced during Respondent's case and during the rebuttal stage. They contend that various adverse inferences can be drawn from such factors as Baty's lack of credibility (based on his admitted lie, as well as general demeanor), Loughridge's failure to testify, that several of Respondent's reasons advanced as the bases for Boring's discharge were afterthoughts not contained in Baty's pretrial affidavit, and other factors. These arguments, however, overlook the fact that a respondent is not put to an election. Thus, the Board has ruled, in effect, that a respondent, whose motion to dismiss has been overruled, does not waive that motion by proceeding with its own case. Expressed differently, in *Hillside Bus Corp.*, 262 NLRB 1254 (1982), the Board stated:

> However, in assessing whether a *prima facie* case has been presented, an administrative law judge must view the General Counsel's evidence in isolation, apart from the respondent's proffered defense. It is only after the General Counsel's *prima facie* requirement has been met that an administrative law judge must consider the respondent's defense.

In *Hillside* the Board found that while the administrative law judge erred in considering all the evidence in determining whether the General Counsel has established a prima facie case, the error was immaterial because the General Counsel's evidence, standing alone, amounted to a prima facie case. Although Board Member Jenkins dissented as to part of the decision on the merits, he states, in footnote 6 at 1256 in relevant part:

> My colleagues . . . point out, correctly, that the Administrative Law Judge must view the General Counsel's evidence in isolation to determine whether a *prima facie* case has been shown before considering Respondent's proffered defenses.

D. *Conclusion*

In light of the foregoing, I conclude that the evidence adduced by the General Counsel and the Charging Party, as of the time they rested at the close of their cases-in-chief, falls short of establishing a prima facie case that Respondent discriminated against Roy Boring in violation of Section 8(a)(4) and (1) of the Act. Accordingly, I shall dismiss the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 21 is a labor organization within the meaning of Section 2(5) of the Act.
3. The evidence adduced during the cases-in-chief of the General Counsel and the Charging Party falls short of establishing a prima facie case that Respondent violated Section 8(a)(4) and (1) of the Act as alleged.

On these findings of fact and conclusions of law and on entire record, I issue the following recommended[17]

ORDER

The complaint is dismissed in its entirety.

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which could be used as justification for discharging Boring. There is no evidence to support this theory. Neither the General Counsel nor the Charging Party, for example, showed that Stultz failed to interview other employees or officials, or that he submitted no plans to Loughridge along the lines of corporate structure and systems.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.